

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

TRACY RHINE,

Plaintiff,

v.

Civil Action No. 5:13CV31
(STAMP)

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM OPINION AND ORDER
AFFIRMING AND ADOPTING REPORT AND
RECOMMENDATION OF MAGISTRATE JUDGE
AND DISMISSING CIVIL ACTION

I. Procedural History

On February 28, 2013, the plaintiff, who is an inmate at Federal Medical Center, Carswell, filed this civil action in this Court. In her complaint, the pro se¹ plaintiff raises a claim under the Federal Tort Claims Act pursuant to 28 U.S.C. § 2671, et seq. Also on that day, and again following the magistrate judge's report and recommendation, she filed motions to proceed in forma pauperis ("IFP").² Pursuant to Local Rule of Prisoner Litigation 2, this case was referred to United States Magistrate Judge James E. Seibert for report and recommendation.

Magistrate Judge Seibert then entered a report and recommendation recommending that the plaintiff's motion for leave

¹"Pro se" describes a person who represents himself in a court proceeding without the assistance of a lawyer. Black's Law Dictionary 1341 (9th ed. 2009).

²In forma pauperis refers to the filing status as a "pauper," or "indigent who is permitted to disregard filing fees and court costs." Black's Law Dictionary 849 (9th ed. 2009).

to proceed IFP be denied, and that this case be dismissed pursuant to 28 U.S.C. 1915(g), because since the plaintiff has been incarcerated since December 2009, she has filed 19 civil actions in the federal courts in the districts in which she has been incarcerated,³ and five of those cases have been dismissed as frivolous or for failure to state a claim. The magistrate judge informed the plaintiff that she was required to file any objections to the report and recommendation recommending dismissal of this civil action within fourteen days of the entry of the report and recommendation. The plaintiff did not file objections.

II. Applicable Law

Pursuant to 28 U.S.C. § 636(b)(1)(C), this Court must conduct a de novo review of any portion of the magistrate judge's recommendation to which objection is timely made. Because no objections were filed, all findings and recommendations will be upheld unless they are "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

III. Discussion

The Prisoner Litigation Reform Act of 1995 generally prohibits prisoners from filing a complaint under IFP status if that prisoner has filed at least three IFP cases previously which have been dismissed as frivolous. Title 28, United States Code, Section 1915(g) specifically provides as follows: "In no event shall a

³This number does not include a motion to vacate that the plaintiff filed under 28 U.S.C. § 2255, but it does include this civil action.

prisoner bring a civil action . . . if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury." The magistrate judge found that this section of the Prison Litigation Reform Act ("PLRA") was applicable in this case, and thus recommended dismissal of this civil action.

This Court has reviewed the record in this case, as well as Magistrate Judge Seibert's report and recommendation. This Court has confirmed that, while she has been incarcerated, the plaintiff has filed five civil actions in federal courts which have been dismissed as frivolous or for failure to state a claim. Further, as the plaintiff's complaint in this case seeks monetary damages for alleged past failure to provide the plaintiff with medical care, this Court finds that this case does not present any allegation that the plaintiff is in "imminent danger of serious physical injury." Accordingly, this Court finds that the magistrate judge's recommendation of dismissal was not clear error.

IV. Conclusion

For the reasons described above, the report and recommendation of the magistrate judge (ECF No. 9) is AFFIRMED and ADOPTED in its entirety. Accordingly, the plaintiff's motions for leave to proceed in forma pauperis (ECF Nos. 2 and 13) are DENIED. This

civil action is DISMISSED WITHOUT PREJUDICE. It is ORDERED that this case be DISMISSED and STRICKEN from the active docket of this Court.

Finally, this Court finds that the plaintiff was properly advised by the magistrate judge that failure to timely object to the report and recommendation in this action would result in a waiver of appellate rights. Because the plaintiff has failed to object, she has waived his right to seek appellate review of this matter. See Wright v. Collins, 766 F.2d 841, 844-45 (4th Cir. 1985).

IT IS SO ORDERED.

The Clerk is directed to transmit a copy of this order to the pro se plaintiff by certified mail and to counsel of record herein. Pursuant to Federal Rule of Civil Procedure 58, the Clerk is DIRECTED to enter judgment on this matter.

DATED: May 7, 2013

/s/ Frederick P. Stamp Jr.
FREDERICK P. STAMP, JR.
UNITED STATES DISTRICT JUDGE